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## Article

### FAIR USE AND THE 1992 AMENDMENT TO SECTION 107 OF THE 1976 COPYRIGHT ACT: ITS HISTORY AND AN ANALYSIS OF ITS EFFECT†

DANIEL E. WANAT\*

#### I. INTRODUCTION

On October 24, 1992, section 107 of the 1976 Copyright Act (Amendment or 1992 Amendment), which relates to fair use of copyrighted works, was amended to add the following provision:

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.<sup>1</sup>

The factors to which the Amendment refers are those originally enacted as part of section 107.<sup>2</sup> None of those factors addressed the relationship between published and unpublished copyrighted

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† I wish to express my appreciation to Ms. Christie Mahn for her diligent research efforts and editorial assistance without which this article would not have been possible. Such errors as may be found in this work, of course, are mine alone.

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1. 17 U.S.C. § 107 (Supp. IV 1993). The congressional effort to amend § 107 as it applied to unpublished works began with the 101st Congress. 137 CONG. REC. S13,924 (daily ed. Sept. 27, 1991) (Judiciary Comm. Rep.). The amendment to § 107 was prompted by two decisions of the United States Court of Appeals for the Second Circuit: *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987), and *New Era Publications, Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). For a further discussion of *Salinger* and *New Era*, see *infra* notes 42-75 and accompanying text.

These two decisions caused attorneys "for historians, biographers, other authors and publishers [to] routinely advise their clients that almost any unauthorized use of previously unpublished materials [would] subject them to a serious risk of liability for copyright infringement." 137 CONG. REC. S13,924 (daily ed. Sept. 27, 1991).

From introduction of the bill through passage of the Amendment by the 102d Congress, the Amendment's legislative history reflects an intention to remedy the perceived chilling effect of *Salinger* and *New Era*. See 137 CONG. REC. S5648-49 (daily ed. May 9, 1991) (statements of Sens. Simon and Leahy); 137 CONG. REC. S13,924-25 (daily ed. Sept. 27, 1991) (Judiciary Comm. Rep.); H.R. REP. NO. 836, 102d Cong., 2d Sess. 1, 4 (1992).

2. 17 U.S.C. § 107 (1988 & Supp. IV 1993). Section 107 provides in part:

works and the fair use finding.<sup>3</sup> In 1985, the United States Supreme Court, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>4</sup> decided that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undissemminated expression will outweigh a claim of fair use."<sup>5</sup>

The author's right to control first publication appears to be the focus of the 1992 Amendment to section 107.<sup>6</sup> This Article will address the relationship between the author's right of control and the 1992 Amendment.

First, the Article analyzes the right to control "undisseminated expression," as considered by the *Harper & Row* Court and its progeny.<sup>7</sup> Second, the Article explores the limitations placed upon that

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.* The factors listed in § 107 are not exclusive. Courts, therefore, may consider factors other than those expressly enumerated in § 107. See *infra* note 103 and accompanying text.

3. The fact that § 107 does not expressly mention the published or unpublished nature of the copyrighted work as a factor pertinent to the outcome of the fair use issue does not manifest a legislative intention to render the published or unpublished nature immaterial to the fair use analysis in a particular case. As the House Report of the Committee on the Judiciary made clear: "The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976).

4. 471 U.S. 539 (1985).

5. *Id.* at 555.

6. This right may be found among the exclusive rights granted by Congress to copyright owners; namely, "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3) (1988).

7. The decisions of both the Supreme Court in *Harper & Row* and the federal courts that followed it were criticized in writings published before the 1992 Amendment. See, e.g., Diane Conley, *Author, User, Scholar, Thief: Fair Use and Unpublished Works*, 9 CARDOZO ARTS & ENT. L.J. 15 (1990); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990); Andrea D. Williams, *The Fair Use Doctrine and Unpublished Works*, 34 HOW. L.J. 115 (1991); James

right purportedly made manifest by the 1992 Amendment. Finally, conclusions are set forth to assist courts and lawyers when attempting to apply the law of the 1992 Amendment in light of its legislative history and *Harper & Row*.

## II. THE RIGHT TO CONTROL FIRST PUBLICATION: *HARPER & ROW, PUBLISHERS, INC. v. NATION ENTERPRISES*

When the Supreme Court, in an opinion written by Justice O'Connor, began to address the defendant Nation Enterprises' <sup>8</sup> defense of fair use to the claim of copyright infringement made by Harper & Row, it first acknowledged several policy premises that underscore the scope of the rights of a copyright owner.<sup>9</sup> The Court stated that these exclusive rights are given to add to a "harvest of knowledge" by enabling contributors to that harvest to obtain a "fair return for their labors."<sup>10</sup> Moreover, the Court found that Congress is authorized to grant these rights both to "motivate . . . creative activity"<sup>11</sup> and to provide public access to the products of that creative activity once the owner's exclusive rights have expired.<sup>12</sup>

Thereafter, the Court delineated the factual premises upon which it would determine whether Nation Enterprises' fair use defense would succeed. First, the work in question, *A Time to Heal*, President Ford's autobiography, was a copyrighted work.<sup>13</sup> Second, Nation Enterprises admitted to "lifting," verbatim, excerpts of the

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Hall, Comment, *Bare-Faced Mess: Fair Use and the First Amendment*, 70 OR. L. REV. 211 (1991).

8. Nation Enterprises admitted that it had copied verbatim excerpts from the unpublished manuscript of the memoirs of President Gerald R. Ford. *Harper & Row*, 471 U.S. at 548.

9. *Id.* Justice Brennan wrote a dissenting opinion in *Harper & Row* that was joined by Justices White and Marshall. *Id.* at 579-605 (Brennan, J., dissenting). Justice Brennan characterized the majority's effort to focus on the unpublished nature of the copyrighted work as one resulting in a "presumption against prepublication fair use." *Id.* at 595 (Brennan, J., dissenting). For Justice Brennan, this presumption was contrary to Congress' intention that the issue of fair use be determined by the examination of a variety of factors on a case-by-case basis. *Id.* at 595-97 (Brennan, J., dissenting).

10. *Id.* at 545-46.

11. *Id.* at 546 (quoting *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 429 (1984)).

12. *Id.* at 546. Article I, section 8, clause 8 of the United States Constitution, commonly referred to as "the Copyright Clause," grants Congress the authority to legislate in the area of copyright. See U.S. CONST. art. I, § 8, cl. 8.

13. *Harper & Row*, 471 U.S. at 548. When outlining the evolution of the copyrighted work at issue, the Court remarked that "the monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value." *Id.* at 546.

author's original language contained in the protected work.<sup>14</sup> Finally, the Court concluded, and Nation Enterprises admitted, that absent the fair use privilege, such "lifting" constituted copyright infringement.<sup>15</sup>

To examine the Court's analysis of whether Nation Enterprises' use of the excerpts either violated Harper & Row's right to control the first publication of *A Time to Heal* or constituted a fair use requires a close look at certain premises. First, prior to incorporation of the fair use defense into the 1976 Copyright Act, the defense's availability was judged from the perspective of the "reasonable copyright owner."<sup>16</sup> Thus the fairness of any unpermitted use turned on whether the reasonable copyright owner impliedly consented to that use.<sup>17</sup> Generally, the reasonable copyright owner's control of the work was nearly absolute in the case of an unpublished work.<sup>18</sup> Any unauthorized use, therefore, was not fair unless either the copyright owner had voluntarily parted with the right to control by authorizing publication or the work was de facto published.<sup>19</sup> In light of these premises, which traditionally limited

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14. *Id.* at 548. According to the Court, when Nation Enterprises copied excerpts from the unpublished manuscript it "arrogated to itself the right of first publication." *Id.* at 549.

15. *Id.* By accepting this premise, the Court avoided addressing the controversial issue of whether Nation Enterprises infringed Harper & Row's copyright not by using elements of the work actually covered by the copyright, but by encroaching upon "the originality embodied in the work as a whole." *Id.* at 548.

16. *Id.* at 549-50.

17. *Id.* Prior to the enactment of the 1976 Copyright Act, the issue of fair use could arise as a matter of state law. Generally, state law regulated the rights of authors in their copyrighted works until the event of publication.

The Act that preceded the 1976 Copyright Act expressly permitted such regulation: "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor." 17 U.S.C. § 2 (1972) (amended 1976).

State law, which gave an author the right to control when and in what form to first publish, also supported the strict rule prohibiting the fair use defense in cases of unpublished works. H.R. REP. NO. 836, 102d Cong., 2d Sess. 4 (1992).

18. *Harper & Row*, 471 U.S. at 551. Although it was clear that the right of control was absolute until publication occurred, the circumstances that would amount to a publication were less than clear. See, e.g., *American Vitagraph v. Levy*, 659 F.2d 1023 (9th Cir. 1981) (contrasting divestive and investive publication); *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963) (distinguishing between limited and general publication).

19. *Harper & Row*, 471 U.S. at 551. For example, de facto publications could occur when a copyrighted work, such as a musical composition, was publicly performed or disseminated to the public. See *id.* It was unclear under the law prior to the 1976 Copyright Act, however, exactly what circumstances constituted a de facto publication. See, e.g., *Ferris v. Frohman*, 223 U.S. 424 (1912) (holding unauthorized public performance did not constitute publication sufficient to cause forfeiture of copyright); cf. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1

the applicability of the fair use defense, Nation Enterprises sought to persuade the Court that the defense should “apply *in pari materia* to published and unpublished works” under the 1976 Copyright Act.<sup>20</sup> The Court flatly rejected this contention, finding that the Act did not support it.<sup>21</sup>

The Court’s reasoning focused primarily on the copyright owner’s right to control first publication.<sup>22</sup> That right included the author’s decisions of “whether and in what form to release his work.”<sup>23</sup> The Court determined that the commercial value of this right lies primarily in “exclusivity.”<sup>24</sup> Given this focus, it appears that the right to control first publication found in the 1976 Copy-

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(1908) (holding piano rolls, perforated musical sheets which pass through piano and sound notes, were not copies for infringement purposes and thus not copies for publication purposes).

20. *Harper & Row*, 471 U.S. at 552. Unlike its historical antecedents, the 1976 Copyright Act provided for a copyright in unpublished works from creation and, in general, preempted state copyright laws. 17 U.S.C. §§ 301-302 (1988). The right to control first publication accorded to Harper & Row, therefore, was granted under 17 U.S.C. § 106(3).

21. *Harper & Row*, 471 U.S. at 552. In 1975, the Senate Committee on the Judiciary, when reporting on the applicability of the fair use defense to unpublished works, concluded:

The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances the copyright owner’s ‘right of first publication’ would outweigh any needs of reproduction for classroom purposes.

S. REP. NO. 473, 94th Cong., 1st Sess. 64 (1975).

The Court in *Harper & Row* used this language to support its finding that Congress intended § 107 of the 1976 Copyright Act to be “narrowly limited” when applied to infringements of unpublished works. 471 U.S. at 554.

Curiously, the *Harper & Row* Court borrowed a statement from the Senate Report, which applied to reproduction of unpublished work for classroom purposes, in support of a blanket statement of congressional intention to disfavor such use. It appears that the Court should have interpreted this conclusion in the Senate Report as reflecting the Committee’s intention to weigh the right to control first publication against the need to reproduce for a certain purpose. Classroom use is, of course, only one of a number of purposes that may be claimed to be fair.

22. *Harper & Row*, 471 U.S. at 546-47. The Court focused on this right despite the fact that the 1976 Copyright Act incorporates both the right of first publication and the fair use defense while simultaneously preempting equivalent rights under state law.

23. *Id.* at 553. The Court made clear that an author was no less deserving of copyright protection because the author intended to publish. *Id.* at 555. This was because the author’s right to control first publication implicated “creative control” and “prepublication rights” that benefitted the public as well as the author. *Id.*

24. *Id.* at 553. Illustrative of the Court’s point is an agreement between Harper & Row and Time, Inc. in which Harper & Row granted Time the exclusive right to publish excerpts of memoirs shortly before the full length version was to be distributed to bookstores. A second payment by Time to Harper & Row was to be renegotiated should the subject material be otherwise published before its release by Time. *Id.* at 542-43.

right Act is similar to the nearly absolute right found at common law.<sup>25</sup> The Court thus concluded that the claim of fair use of an unpublished work will ordinarily fail.<sup>26</sup>

Although in *Harper & Row* the Supreme Court recognized that the fair use defense generally fails where the copyright infringement involved is the unauthorized use of an unpublished work, it nevertheless analyzed Nation Enterprises' claim of fair use in light of section 107 of the Copyright Act and its enumerated factors.<sup>27</sup> Of particular importance to the Court's inquiry was the second factor of section 107, "the nature of the copyrighted work."<sup>28</sup>

Once the Court determined that *A Time to Heal* was unpublished, it then concluded that such a characteristic "is a critical element of its nature."<sup>29</sup> The Court thereafter indicated that the

25. In support of its position, the Court relied on the COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW, 87th Cong., 1st Sess. 41 (Comm. Print 1961) ("overbalancing reasons to preserve the common law protection of undissemated works until the author or his successor chooses to disclose them"). *Harper & Row*, 471 U.S. at 553. For a further discussion of fair use prior to the 1976 Copyright Act, see *supra* notes 16-19 and accompanying text.

26. See *supra* note 19 and accompanying text. Nation Enterprises argued that a different rule should apply when the material published is of "high public concern," thus implicating the First Amendment. *Harper & Row*, 471 U.S. at 555-56. Under this argument, Nation Enterprises contended that the precise manner in which an author expresses himself is as "newsworthy" as the content of the expression and thus prepublication use of the author's precise manner is privileged under the First Amendment. *Id.* at 556.

The Court rejected this First Amendment argument for many reasons. Central to each reason was the long-standing principle adopted to square copyright law with the First Amendment: a copyright protects only the form of expression and not the ideas expressed. *Id.*

Under this principle, the free dissemination of ideas is assured and First Amendment values served. The newsworthiness of the expression, the Court explained, did not justify additional First Amendment protection at the expense of the copyright owner who would lose the economic incentive provided by the copyright and thereby be discouraged from authorship, which would leave the public with less or no material of social value to read. *Id.* at 557. The Court added that, by negative implication, the First Amendment "freedom not to speak publicly" would not be served if newsworthiness justified the unauthorized publication of otherwise unpublished expression. *Id.* at 559.

27. *Harper & Row*, 471 U.S. at 561-69. Discussion of the Court's analysis of the first and third fair use factors is omitted from this Article because the Court concluded that neither factor served to support a finding of fair use. *Id.* at 561-66. In effect, the Court applied the general rule that the unpublished nature of the work at the time of the alleged infringement barred the fair use claim.

28. 17 U.S.C. § 107(2) (1988).

29. *Harper & Row*, 471 U.S. at 564. The Court also characterized *A Time to Heal* as a "historical narrative or autobiography." *Id.* Although the factual nature of the work weighed in favor of a fair use claim, the Court found that Nation Enterprises' use exceeded that "necessary to disseminate the facts." *Id.* at 563-64. This unnecessary use weighed against a fair use finding. *Id.* at 563.

scope of fair use is narrower in unpublished works than in the case of published works because of the unpublished nature of the work.<sup>30</sup> Finally, the Court reasoned that narrowing the scope of the fair use defense was appropriate because the right to control first publication includes the author's unique choices of whether, "when, where, and in what form first to publish a work."<sup>31</sup> This combination of choices is not otherwise found among the rights of a copyright holder under the 1976 Copyright Act.<sup>32</sup> The right to control first publication, therefore, is broader in scope than other rights found within the Act and naturally leads to a narrower scope of fair use.

The unpublished nature of *A Time To Heal* was also a fact significant to the Court's application of the final section 107 factor, "the effect of the use upon the potential market for or value of the copyrighted work."<sup>33</sup> As a result of Nation Enterprises' unauthorized publication, Time refused to pay Harper & Row \$12,500 still remaining due under the terms of the contract between the parties, in which Harper & Row sold to Time the right to serialize excerpts from the work prior to its authorized first publication.<sup>34</sup> The Court thus concluded that Nation Enterprises' use clearly "competed for a share of the market for prepublication excerpts"<sup>35</sup> and "pose[d] substantial potential for damage to the marketability of first serialization rights in general."<sup>36</sup>

The Supreme Court's opinion in *Harper & Row* opened the door to litigation over the question of whether the unpublished nature of the work dictated a stricter application of the section 107 fair use defense than the section 107 application given a published work. As the case law explored in the next section of this Article

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30. *Id.* at 564.

31. *Id.*; see *supra* notes 22-24 and accompanying text.

32. 17 U.S.C. § 106 (1988) (enumerating exclusive rights of copyright owner).

33. *Harper & Row*, 471 U.S. at 566.

34. *Id.* at 567.

35. *Id.* at 568.

36. *Id.* at 569. In reaching this conclusion, the Court recognized that § 107(4) of the 1976 Copyright Act focused on the potential market for the copyrighted work as well as the effect upon the value of the work. *Id.* at 566.

The Court also accepted the proposition that there was a market for prepublication excerpts. *Id.* at 568. Finding Nation Enterprises' use fair would risk damaging the copyright owner's marketability of first serialization rights. *Id.* at 569. The Court foresaw that uses similar to Nation Enterprises' use posed, in the aggregate, a substantial threat to the potential market of the copyright owner. *Id.* This potential market for first serialization rights existed, of course, only as a result of the exclusive right of the copyright owner to control the first publication of the work.



reflects, the treatment given unpublished works was not only more strict than the treatment given public works, but also appeared to be moving, at times, toward a per se rule.<sup>37</sup> This rule, when applied, would preclude the fair use defense regardless of the other fair use considerations.

The issue of whether to adopt a per se rule that would eliminate the fair use defense where the work at issue is unpublished created a rift among the judges in the United States Court of Appeals for the Second Circuit. The next section of this Article will chronicle this split among the judges sitting within the Second Circuit.

### III. THE RIGHT TO CONTROL FIRST PUBLICATION AND THE PROGENY OF *HARPER & ROW*

The decisions of the Second Circuit best exemplify the diversity in interpretation and application of *Harper & Row*.<sup>38</sup> The first of those cases was *Salinger v. Random House, Inc.*<sup>39</sup> In *Salinger*, the court examined the relationship between the fair use defense and *Harper & Row* under circumstances where the unpublished works at issue were several personal letters written by the well-known but reclusive author, J.D. Salinger.<sup>40</sup>

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37. The Court in *Harper & Row* is ambiguous regarding the effect of a work's published or unpublished nature on the probable success of a fair use claim. Not only did the Court analyze in detail the history and value of the author's right to control the first publication of a work, but it also reached certain conclusions as part of that analysis that could lead lower courts to conclude a use is unfair because the work used was unpublished. See *supra* notes 20-26 and accompanying text.

Even the part of the *Harper & Row* opinion in which the Court approached the analysis of fair use from the perspective of the four factors of § 107 of the 1976 Copyright Act reflected the Court's tendency to emphasize the unpublished nature of the work and the relationship of that characteristic to the work's value or marketability. The Court's opinion could be interpreted as prescribing a rule of general application which the Court believed was within the legislative intent. See *supra* notes 29-31 and accompanying text.

38. See *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991); *Association of Am. Medical Colleges v. Cuomo*, 928 F.2d 519 (2d Cir.), *cert. denied*, 112 S. Ct. 184 (1991); *New Era Publications Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). The United States Court of Appeals for the Second Circuit is a significant circuit because it includes New York City, the center of the publishing industry in the United States.

39. 811 F.2d 90 (2d Cir. 1987).

40. *Id.* at 92. In the district court, Judge Leval's determination that the copying was "minimal" served as the basis for the district court's finding of fair use. *Id.* at 94. Judge Leval's consideration of factors other than the unpublished nature of personal letters marks the beginning of the split among trial and appellate judges of the Second Circuit concerning the proper application of the fair use doctrine

The court began its fair use analysis in *Salinger* by stating that: "Central to this appeal is the application of the defense of 'fair use' to unpublished works."<sup>41</sup> Taking its cue from *Harper & Row*, the court in *Salinger* noted that "the [Supreme] Court underscored the idea that unpublished letters normally enjoy insulation from fair use copying."<sup>42</sup>

As a result, the *Salinger* court expressly stated that it would place "*special emphasis* on the unpublished nature of *Salinger's* letters."<sup>43</sup> The court then proceeded to examine the circumstances of *Salinger* in light of the section 107 factors.

*Harper & Row's* impact on the *Salinger* court's section 107 analysis is evidenced in the Second Circuit's consideration of the nature of the copyrighted work at issue. Following its assessment, the *Salinger* court concluded that two propositions may be drawn from *Harper & Row*. The first is that normally the expression found in unpublished works is protected completely from being copied.<sup>44</sup> The second is that there is a "diminished *likelihood*" that copying is fair if the work is unpublished.<sup>45</sup> Although the court's reasoning in support of these propositions is clearly stated, it lacks the particulars that would make it persuasive. In this regard, the court in *Salinger* relied on "the tenor of the [Supreme] Court's entire discussion of unpublished works."<sup>46</sup>

The court in *Salinger* interpreted *Harper & Row* as enlarging the copyright owner's right to control the first publication of a work by narrowing the circumstances under which an infringement of

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under *Harper & Row*. See generally Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) (arguing fair use analysis should be premised on consideration of value of unpublished work to public in relation to value of claimed fair use).

41. *Salinger*, 811 F.2d at 95. Prior to recognizing that the unpublished nature of the copyrighted works was pivotal to the fair use analysis, the court stated that a personal letter is an authored literary work. *Id.* at 94. As with any such work, the letter's "expressive content" is the subject of a copyright. *Id.* at 95; see generally Alan Lee Zegas, Note, *Personal Letters: A Dilemma for Copyright and Privacy Law*, 33 RUTGERS L. REV. 134 (1980).

42. *Salinger*, 811 F.2d at 95.

43. *Id.* at 96 (emphasis added).

44. *Id.* at 97.

45. *Id.* (emphasis in original). The Second Circuit also rejected the proposition suggested in *Harper & Row* that the fair use defense is narrower in scope for unpublished works because the quantity of the work that may be copied is less than it would be if the work were published. *Id.* By rejecting this proposition, the Second Circuit eviscerated the de minimis copying rationale to support a finding of fair use. For a further discussion of the de minimis copying rationale, see *supra* note 40.

46. *Salinger*, 811 F.2d at 97.

that right could successfully constitute a fair use. If *Salinger* was the beginning of a pattern before the Second Circuit, historians and biographers would be relegated to reporting only the facts surrounding persons of interest.<sup>47</sup> In this regard, the public benefit of access to unpublished copyrighted materials would have to await either an authorized publication or the copyright's expiration.<sup>48</sup>

Two questions arise from the *Salinger* decision. Did it mark the beginning of a line of authority that would enlarge authors' right to control the first publication of their works and, consequently, reduce the number of instances in which copying is a fair use? Would the relationship between the right to control first publication and the fair use defense require that the outcome of each case would continue to be fact-dependent? The answers to these questions were soon forthcoming, beginning with the opinions of Judge Leval for the United States District Court for the Southern District of New York<sup>49</sup> and the Second Circuit in *New Era Publications International, ApS v. Henry Holt & Co.*<sup>50</sup>

In *New Era*, the unpublished materials at issue included the personal diaries and journals of L. Ron Hubbard.<sup>51</sup> These materials and parts of Hubbard's published works were reproduced in *Bare-Faced Messiah*, a biography that purported to expose the fictive nature of Hubbard's public image as a "romantic adventurer and philosopher."<sup>52</sup>

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47. The *Salinger* court indicated, however, that the efforts of these classes of authors would not be affected significantly and the enhancement of "public knowledge" would continue with little harm. *Salinger*, 811 F.2d at 100.

Whether the court was correct in its prognostication depends significantly upon the abilities of historians and biographers to distinguish fact, unprotected by copyright, from expression, which copyright protects. History teaches that making this distinction may be extremely difficult. Compare *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), cert. denied, 449 U.S. 841 (1980) (holding that copyright only covers author's original expression of facts in historical accounts) with *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664 (7th Cir. 1950) (holding that copyright embraces translations of historical writings). Even the Supreme Court in *Harper & Row* sought to avoid the task of making this distinction. See *supra* note 15 and accompanying text.

48. *Salinger*, 811 F.2d at 100. In a case like *Salinger*, the likelihood of an authorized publication appears slim if not non-existent. *Id.* at 92 (author claimed that he would not permit letters to be published during his lifetime). If publication does not occur, public access will have to await not only the death of the author but it may also have to await the passing of fifty years thereafter. 17 U.S.C. § 303 (1988).

49. *New Era Publications Int'l, ApS v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd*, 873 F.2d 576 (2d Cir. 1989), cert. denied, 493 U.S. 1094 (1990).

50. 873 F.2d 576 (2d Cir. 1989), cert. denied, 493 U.S. 1094 (1990).

51. *Id.* at 579.

52. *Id.* at 578-80. Hubbard was the founder of the Church of Scientology. *Id.*

In the district court opinion in *New Era*, Judge Leval concluded that “given *Salinger’s strong presumption* against a finding of fair use for unpublished materials,” the use of a small amount of such material, “but more than [a] negligible size,” precluded the availability of the fair use defense to the defendant charged with copyright infringement.<sup>53</sup> In reaching his conclusion, Judge Leval acknowledged that he was compelled to so decide “under [the] mandate of the *Salinger* opinion.”<sup>54</sup> In fact, the judge noted that, were it not for the *Salinger* opinion, he would have found that the defense of fair use had been demonstrated as to the unpublished works that were reproduced.<sup>55</sup>

In this regard, Judge Leval opined that the unpublished nature of the materials that were reproduced did not negate the fair use defense, but merely argued against its application.<sup>56</sup> The court added that when the fair use defense is raised in the context of unpublished materials, “the defendant must establish a highly convincing case in favor of fair use.”<sup>57</sup> According to Judge Leval, the defendant in *New Era* established this by demonstrating a “powerfully compelling fair use purpose” in addition to other factors relevant to the success of the fair use defense.<sup>58</sup>

The purpose to which Judge Leval referred was of exposing Hubbard’s character flaws by using Hubbard’s own words.<sup>59</sup> Examples of other factors thought by the judge to justify a fair use finding included the use of Hubbard’s expressions to demonstrate the variety of his character flaws and the complex nature of his personality.<sup>60</sup>

Judge Leval also recognized that when the material used is unpublished, the test for determining whether the use is fair is “nar-

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53. *New Era*, 695 F. Supp. at 1524 (emphasis added).

54. *Id.*

55. *Id.*

56. *Id.* at 1523.

57. *Id.*

58. *New Era*, 695 F. Supp. at 1523-25. Judge Leval believed that the biographer’s “use of the author’s particular words to demonstrate the validity of an important critical point . . . [such as] demonstrations of traits of character” was a use of those words “not as a matter of literary expression[,] but for what the choice of words reveals about the subject.” *Id.* at 1523-24.

Judge Leval, it seems, recognized that, while the biographer must be limited to reporting facts about the subject, there are instances where the important facts are the “words themselves.” *Id.* at 1524. The necessity of using the subject’s choice of words in these instances justifies favoring the defendant.

59. *Id.* at 1524.

60. *Id.*

rower" in scope.<sup>61</sup> When, however, the use made is to enliven text or to communicate significant points, these purposes should provide a compelling reason to determine that the materials' use is fair.<sup>62</sup> Nevertheless, Judge Leval felt compelled by the *Salinger* opinion to conclude that these uses likewise did not constitute a fair use.<sup>63</sup>

It is clear from the district court opinion in *New Era* that the Second Circuit's *Salinger* opinion compelled Judge Leval to apply certain propositions in his analysis of the unpublished works. In fact, but for *Salinger*, Judge Leval would have reached a different result and sustained the fair use defense.<sup>64</sup>

When appeal was taken in *New Era*, the Second Circuit made two distinct findings important to its resolution of the fair use issue. First, the court found that regardless of the *Salinger* decision's special emphasis on the unpublished nature of the work, the defendant's use of the copyrighted materials was not a fair use under the four factors set forth in section 107.<sup>65</sup> Second, the court reviewed Judge Leval's analysis of the relationship between the unpublished nature of the materials reproduced and the fair use defense. The Second Circuit rejected Judge Leval's reasoning in its entirety.<sup>66</sup>

Assessing the district court's application of *Salinger*, the court of appeals concluded that the second fair use factor "weighs heavily in favor of [New Era]," because the court in *Salinger* made it clear that "unpublished works normally enjoy complete protection."<sup>67</sup> Thus it appears that the court of appeals' opinion in *New Era* crystallized the second fair use factor of section 107. In fact, the peti-

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61. *Id.* at 1503.

62. *Id.* at 1524.

63. *Id.* The uses Judge Leval described were not present in *New Era*. Rather, they were present in *Salinger*, where Judge Leval found them to constitute a fair use. *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987).

64. *See supra* note 58 and accompanying text.

65. *New Era*, 873 F.2d at 583 (making clear that three of four fair use factors favored New Era).

66. *Id.* at 584. Chief Judge Oakes, in a separate concurring opinion, expressed concern that the majority unnecessarily took issue with Judge Leval and so appeared to "cast in concrete *Salinger*." *Id.* at 585 (Oakes, C.J., concurring). For Chief Judge Oakes, the relationship between the unpublished nature of the work at issue and fair use required that the alleged infringer convincingly demonstrate that despite the nature of the work, the use is fair. Thus the fair use analysis would remain flexible, dependent on consideration of all the relevant factors. *Id.* at 587-95 (Oakes, C.J., concurring); *see also* James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983 (1990).

67. *New Era*, 873 F.2d at 583.

tion for rehearing and petition for a rehearing en banc were denied.<sup>68</sup>

It appeared doubtful that the *New Era* and *Salinger* decisions would culminate in a per se rule precluding any fair use claim in the context of an unpublished work. In this regard, Judge Miner, although concurring with the majority's decision on the rehearing petitions, filed a separate opinion, in order to address this issue in more detail.<sup>69</sup> Judge Miner reiterated that the denial of both petitions reflected a commitment to the application of settled law.<sup>70</sup> The law to which Judge Miner referred was that of *Harper & Row*.<sup>71</sup>

For Judge Miner, the decision in *Harper & Row* "teaches that unpublished, copyrighted material very rarely will be the subject of fair use. It recognizes that the right *not* to publish is a most important one."<sup>72</sup> In Judge Miner's opinion, however, a fair use of an unpublished work is rare, but may exist based on application of all of the fair use factors.<sup>73</sup>

Judge Newman dissented from the denial of *New Era*'s petition for a rehearing en banc.<sup>74</sup> Judge Newman felt the rehearing was necessary to clear up the misconception that researchers, biographers and journalists might believe that they may not copy some small amount of an author's unpublished expression in order to disseminate information fairly and accurately.<sup>75</sup> Implicit within Judge Newman's concern is that such use is fair and should be so stated by the majority to minimize the risk of lawful users being sued for infringement. Implicit as well, is Judge Newman's rejection of a per se rule that would prohibit such a use from being found fair.

The question of whether or not a per se rule existed within the Second Circuit precluding the fair use of an unpublished work con-

68. 884 F.2d 659, 660 (2d Cir. 1989).

69. *Id.* at 660 (Miner, J., concurring). Judges Meskill, Pierce and Altimari joined in this opinion. *Id.* (Miner, J., concurring); see also Roger J. Miner, *Exploiting Stolen Text: Fair Use or Fair Play?*, 37 J. COPYRIGHT SOC'Y U.S.A. 1 (1989).

70. *New Era*, 884 F.2d at 660 (2d Cir.) (Miner, J., concurring), cert. denied, 493 U.S. 1094 (1990).

71. *Id.* (Miner, J., concurring). For a further discussion of *Harper & Row*, see *supra* notes 21-36 and accompanying text.

72. *New Era*, 884 F.2d at 660 (Miner, J., concurring) (emphasis in original).

73. *Id.* (Miner, J., concurring). Judge Miner noted that this case simply was one in which the rare use did not exist. *Id.* (Miner, J., concurring).

74. *Id.* at 661 (Newman, J., dissenting). Judges Kearse and Winter and Chief Judge Oakes concurred in this opinion. *Id.* (Newman, J., dissenting); see also Jon O. Newman, *Not the End of History: The Second Circuit Struggles with Fair Use*, 37 J. COPYRIGHT SOC'Y U.S.A. 12 (1989).

75. *New Era*, 884 F.2d at 663 (Newman, J., dissenting).

tinued with the opinion in *Wright v. Warner Books, Inc.*<sup>76</sup> In *Wright*, the court of appeals concluded, after evaluating the unpublished materials which were copied, that the defendants used more than just factual content. The court found that the defendants reproduced "borderline expression" of the author, about whom defendants had written a biography.<sup>77</sup> Concluding that the defendants did in fact use unpublished expression, the court found that the unpublished nature of the copied materials favored the plaintiff under factor two of section 107.<sup>78</sup>

The court followed the analyses of *Salinger* and *New Era* in arriving at this finding.<sup>79</sup> After characterizing unpublished works as the "favorite sons" of factor two, the court in *Wright* recognized: that the scope of fair use was narrow; that it was yet to be applied in favor of the infringer; that the factor weighs heavily in favor of the copyright owner and that little room for discussion exists when unpublished expression is copied.<sup>80</sup>

However, the court in *Wright*, unlike the courts in *Salinger* and *New Era*, ultimately found that the defendants' use of the unpublished expression was fair. In doing so, the court rejected the premise that *Harper & Row* and earlier Second Circuit decisions had established a per se rule precluding a fair use finding in cases of unpublished works.<sup>81</sup> As the court stated: "The fair use test remains a totality inquiry, tailored to the particular facts of each case. Because this is not a mechanical determination, a party need not 'shut-out' her opponent on the four factor tally to prevail."<sup>82</sup> The

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76. 953 F.2d 731 (2d Cir. 1991). From the time that *New Era* was decided until the *Wright* decision, there was one other Second Circuit case worthy of brief note: *Association of American Medical Colleges v. Carey*, 728 F. Supp. 873 (N.D.N.Y. 1990), *rev'd sub nom.* *Association of American Medical Colleges v. Cuomo*, 928 F.2d 519 (2d Cir.), *cert. denied*, 112 S. Ct. 184 (1991).

In *Carey*, the unpublished nature of the work compelled the district court to enter summary judgment on the fair use issue under the authority of *Salinger* and *New Era*. 728 F. Supp. at 885-86. In a decision that was a portent of things to come, the Second Circuit reversed after finding that factors other than the unpublished nature of the copyrighted work were to be considered in evaluating the claim of fair use. *Cuomo*, 928 F.2d at 523-26.

77. *Wright*, 953 F.2d at 736. The materials the court found to be expression protected under the 1976 Copyright Act embodied the "creative style" of Richard Wright, the subject of the biography. *Id.* To a certain extent, therefore, the protected materials in *Wright* were analogous to those found by the court in *Salinger* to be copied unfairly. See *supra* note 41 and accompanying text.

78. *Wright*, 953 F.2d at 738.

79. See *supra* notes 41-46, 65-67 and accompanying text.

80. *Wright*, 953 F.2d at 737.

81. *Id.* at 739-40.

82. *Id.* at 740.

court was able to find for the defendants because after a detailed examination of the other factors deemed relevant by the court to section 107 analysis, all of the others aside from "the nature of the copyrighted work" favored the defendants.<sup>83</sup>

The *Wright* opinion clarified the Second Circuit's position on the status and effect of the unpublished nature of the work copied: The nature of work factor found in section 107 of the 1976 Copyright Act weighs heavily in favor of the copyright owner where more than de minimis protected expression is used.<sup>84</sup> The weight accorded the unpublished nature of the work with respect to the other section 107 factors, however, remained unclear.

Before the Second Circuit or the other courts of appeal had much opportunity to continue with the judicial evolution of the principles of *Harper & Row*, Congress intervened and amended section 107.<sup>85</sup> This Article will now analyze the Amendment.

#### IV. THE 1992 AMENDMENT TO SECTION 107 OF THE COPYRIGHT ACT: AN ANALYSIS

In March 1992, a bill was introduced in the House of Representatives that was intended to make manifest the legislative conclusion that no per se rule of unfair use in cases of unpublished works exists.<sup>86</sup> The bill, with little change in text, was passed by voice vote in both the House and Senate.<sup>87</sup> The bill became law on October 24, 1992.<sup>88</sup>

Although Congress considered a possible per se rule of unfair use in the context of unpublished works, its reaction was to affirm the historical understanding of the nature of the defense. The Report of the Committee on the Judiciary, compiled in 1976, chronicles part of the 1976 Copyright Act's history and reflects this legislative understanding:

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83. *Id.* In particular, the court found that the defendants' work was a scholarly work, a biography that contributed to the public's understanding of the biography's important subject. *Id.* In addition, the court concluded that the biography was non-exploitative and would not adversely affect the market for the works of the subject-novelist. *Id.* Finally, the court found that the use made of unpublished expression was "modest" and not designed to "enliven her [the biographer's] prose." *Id.*

84. *Id.*

85. H.R. REP. NO. 836, 102d Cong., 2d Sess. 12 (1992).

86. *Id.* at 1. In a little over one month's time, the bill was reported on favorably by the House Committee on the Judiciary to the full House. *Id.* at 2.

87. 138 CONG. REC. S17,358 (daily ed. Oct. 7, 1992); 138 CONG. REC. H7991 (daily ed. Aug. 11, 1992).

88. Fair Use of Copyrighted Works, Pub. L. No. 102-492, 106 Stat. 3145 (1992).



Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.<sup>89</sup>

In addition, the bill was introduced in response to the concerns of authors and their publishers over the effect of the *Salinger* and *New Era* decisions on the authorship of biographical and historical works.<sup>90</sup>

The principal concern expressed by authors and publishers about the *Salinger* decision was that the Second Circuit, by rejecting the defendants' fair use defense, refused to recognize the practical dilemma that a biographer faces in either "risking infringement by copying verbatim, or distorting his or her subject's meaning by putting the passage in the biographer's own words."<sup>91</sup> In fact, according to the court in *Salinger* when too much verbatim copying occurs, the biographer "deserves to be enjoined."<sup>92</sup>

The publishers' other concern involved the statement in *Salinger* that unpublished works "normally enjoy complete protection."<sup>93</sup> The decision in *New Era* further heightened this concern against such a rule of general application that would require substantial proof to overcome.<sup>94</sup>

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89. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65 (1976). Inconsistent with this history of the claim of fair use is its common law application to unpublished works. See *supra* notes 18-21 and accompanying text.

90. H.R. REP. NO. 836 at 4. The Supreme Court's opinion in *Harper & Row* lays, of course, at the bottom of these concerns. *Id.* at 5; see *supra* notes 9-36 and accompanying text.

91. H.R. REP. NO. 836 at 5. When the court in *Salinger* addressed the issues surrounding verbatim copying or paraphrased distortion, it reasoned that a biographer does not run a risk of infringement when he copies facts which, under copyright, he is free to do. 811 F.2d 90, 96 (2d Cir. 1987). The court added that distortion is unlikely when facts are copied. *Id.*

If, however, the biographer copies "more than minimal amounts" of the subject's copyrighted expression, he may be copying the attribute that is precisely protected by copyright. *Id.* For example, the biographer in *Salinger* copied the subject's "vividness" of expression. *Id.* The court in *Salinger* thus concluded that such copying was not a fair use and could be enjoined despite the fact that a biographer may be subject to criticism for leaving the "vividness" of another's expression out of his work. *Id.*

92. 811 F.2d at 96; see also H.R. REP. NO. 836 at 6 (referring to *Salinger* court's position).

93. H.R. REP. NO. 836 at 6 (citing *Salinger*, 811 F.2d at 97); see *supra* notes 41-43 and accompanying text.

94. See *supra* notes 65-67 and accompanying text.

The House Report, when addressing the opinion in *New Era*, found that the court's decision "echoed" the conclusion of *Salinger*.<sup>95</sup> The Report also noted that the Second Circuit was sharply divided on the unpublished works and fair use issues.<sup>96</sup> The *Wright* court's decision, however, that "[n]either *Salinger*, *Harper & Row*, nor any other case . . . erected a *per se* rule regarding unpublished works,"<sup>97</sup> was referred to with approval in the Report.<sup>98</sup>

The House Report also provided examples of instances other than *Wright* where the fair use defense may prevail in the context of unpublished works:

[I]n some circumstances it would be a fair use to copy an author's unpublished expression where necessary to report fairly and accurately a fact set forth in the author's writings. . . . "Often, it is the words used by [a] public figure (or the particular manner of expression) that are the facts calling for comment["] [sic].<sup>99</sup>

The Report appears to address *Harper & Row* in two ways: first, by indicating that incorporating quotes from the unpublished work may be a fair use and second, by indicating that the manner of expression of a public figure when copied may be a fair use. The inference may be drawn, therefore, that the Supreme Court erred in refusing to embrace special "user friendly" considerations, adverse to public figures, when interpreting the section 107 fair use defense.<sup>100</sup>

The House Report also criticized the decision in *Harper & Row* based on the Court's ambiguous statement that "the scope of fair use is narrower with respect to unpublished works."<sup>101</sup> The Report

95. H.R. REP. NO. 836 at 6.

96. *Id.*

97. *Wright*, 953 F.2d at 740.

98. H.R. REP. NO. 836 at 6.

99. *Id.* at 8 (footnote omitted) (alteration in original) (quoting *New Era*, 884 F.2d 659, 660 (2d. Cir. 1989) (Miner, J., concurring). In suggesting that it may be a fair use to copy unpublished expression as an adjunct to fair reporting, the Report appears to accept the wisdom of Judge Newman's dissent from the denial of the petition for a rehearing en banc in *New Era*. *Id.* at 8 n.27.

100. See *supra* note 29 and accompanying text. If the defense of fair use is to remain a flexible one, it is unlikely that special rules will evolve within federal courts that work to the detriment of authors who are public figures. Just as the unpublished nature of the work does not justify a *per se* rule of unfair use, the status of the work's author as a public figure ought not support a *per se* rule that the use is fair.

101. H.R. REP. NO. 836 at 8; see *supra* note 29 and accompanying text (discussing Nation Enterprises' unsuccessful attempt to advance First Amendment argument before Court in *Harper & Row*).

likewise rejected the court's interpretation in *Salinger* of this ambiguous language, which the court construed to mean that unpublished works "normally enjoy complete protection against copying any protected expression."<sup>102</sup> Instead, the Report accepted the Copyright Office's interpretation of *Harper & Row*. The Copyright Office concluded that the unpublished nature of the copied expression does not lead to a "diminished likelihood that the fair use defense, as a whole, will in every case not be available."<sup>103</sup>

After examining and evaluating the existing case law interpreting the application of section 107 to copyright infringement of unpublished works, the Committee on the Judiciary next expressed its intention behind the proposed Amendment to section 107. The Committee stated:

This [amendment] has a narrow, but important purpose: to reiterate Congress's intention in codifying fair use that in evaluating a claim of fair use, including claims involving unpublished works, the courts are to examine all four statutory factors set forth in Section 107, as well as any other factors deemed relevant in the court's discretion.<sup>104</sup>

The Report adds that the Amendment's purpose can be fulfilled by courts in two ways. First, courts can construe the Amendment as written.<sup>105</sup> This construction eliminates the per se rule that would preclude a successful claim of fair use in any case.<sup>106</sup>

Second, courts can examine those factors made explicit in section 107.<sup>107</sup> The court, in its discretion, should assess factors in addition to those found in the statute.<sup>108</sup> The Committee recognized

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102. H.R. REP. NO. 836 at 8 (quoting *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987)); see *supra* notes 41-45 and accompanying text.

103. H.R. REP. NO. 836 at 9. The House Report did, however, affirm the Supreme Court's finding in *Harper & Row* that, for purposes of the second statutory factor, "the unpublished nature of the work is a 'key, though not necessarily determinative' factor tending to negate a defense of fair use." *Id.* (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985)).

104. *Id.*

105. *Id.*

106. *Id.* The proposed amendment read as follows: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." *Id.* The Committee intended that the word "itself" within the proposal be interpreted to insure a meaning that precluded a per se rule. *Id.* The proposal, unchanged in this regard, was enacted into law in 1992. See *supra* note 89 and accompanying text.

107. H.R. REP. NO. 836 at 9.

108. *Id.* at 9-10. The Committee intended to make manifest this way of accomplishing the proposed amendment's purpose by use of the phrase "all the above factors" in its text. *Id.* at 9. This phrase was to be construed "to encompass

that the Supreme Court in *Harper & Row* correctly held that courts have the discretion to consider factors other than those found in section 107 when analyzing a fair use claim.<sup>109</sup>

The 1992 Amendment, if applied as suggested by the House Report, grants to the copyright owner of an unpublished work a right of control that is the "key" to defeating a claim of fair use.<sup>110</sup> Although a "key" factor, the right to control is not absolute. It must be analyzed together with the other fair use factors illustrated in section 107 as well as other factors that courts find relevant to individual cases.<sup>111</sup>

## V. CONCLUSIONS

Several lessons can be learned from the chronology of *Harper & Row* through the 1992 Amendment and its legislative history. First, the rule of fair use under the state laws of copyright where the right to control the publication of an unpublished work would preclude the successful application of the fair use defense did not necessarily become a part of the 1976 Copyright Act. Rather, section 107, as originally enacted, was intended to be a flexible defense not bound by per se rules.

Second, the right to control the first publication of an unpublished work is distinguishable under the 1976 Copyright Act from other rights found within it. In this regard, the right to control may be considered the "key" element in a fair use analysis and so one upon which that analysis may turn in favor of the copyright owner.

Third, although the copyright owner's right to control the first public dissemination of his work is a "key" element in the fair use analysis, the claim of fair use may succeed if the other fair use factors apply. These elements may be found in section 107 of the Copyright Act or may be independently recognized by federal courts.

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the terms 'including' and 'such as' embodied in the preamble to Section 107, terms that are defined in Section 101 of Title 17 as being 'illustrative and not limitative.'" *Id.* at 9-10.

109. *Id.* at 9 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562-63 (1985) (considering defendant's bad faith in using purloined "manuscript")).

110. See *supra* notes 26-30 and accompanying text. In this regard, the reasoning of the Supreme Court in *Harper & Row* appears sound and should be followed.

111. The core of § 107 analysis, premised on both those factors expressly enumerated in § 107 and others deemed relevant through judicial fiat, is founded on the judicially created right of the public to control dissemination of an unpublished work in relation to the claim of fair use. See *supra* note 40 and accompanying text.

Finally, for the 1992 Amendment to achieve the results outlined by the House Judiciary Committee as indicated in its Report, federal courts must recognize that the hallmark of a claim of fair use is its equitable character, even in cases of the right to control the first publication of unpublished works. The failure or success of a fair use claim, therefore, depends upon the use of reason under the circumstances of individual cases. The 1992 Amendment and its history provide for the courts the latest such reminder.